J. W. Rhodes Department Stores *and* Lawrence D. Freeman. Case 3-CA-10549

24 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 10 September 1982 Administrative Law Judge Martin J. Linsky issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, J. W. Rhodes Department Stores, Ithaca, New York, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In finding the violation herein, Member Hunter notes that Respondent's lawsuit lacked a reasonable basis in fact and that it was not filed in good faith but rather solely to retaliate against employee Freeman for having filed a charge with the Board. Additionally, although Member Hunter subscribes to the principles set forth in the Board's decision in *Power Systems*, 239 NLRB 445 (1978), enforcement denied 601 F.2d 936 (7th Cir. 1979), he does not agree with the result reached by the Board on the facts of that case.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge: This case was tried before me in Ithaca, New York, on June 23, 1982. The complaint in this matter was issued by the Regional Director for Region 3 on August 31, 1981, based on a charge filed by Lawrence D. Freedman on July 13, 1981. The complaint alleges that J. W. Rhodes Department Stores (herein Respondent) violated Section 8(a)(1) and (4) of the National Labor Relations Act (herein the Act), when it filed a civil lawsuit against Lawrence D. Freedman and his father because Lawrence D. Freedman had previously filed a charge against Respondent with the National Labor Relations Board. Respondent admits it filed a lawsuit against both Lawrence D. Freedman and his father but denies the commission of any unfair labor practice.

Upon consideration of the entire record, to include the closing argument of the General Counsel and the posthearing brief filed by Respondent, and upon my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, maintained, at all times material herein, its principal office and place of business at Pyramid Mall, Ithaca, New York, and is, and has been at all times material herein, engaged at said location in the operation of a retail department store.

During the past fiscal year, Respondent, in the course and conduct of its business operations, sold and distributed products, the gross value of which exceeded $500,000. During the same period of time, Respondent received goods valued in excess of $50,000 transported to its place of business in interstate commerce directly from States of the United States other than the State of New York.

Respondent, by its own admission, is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE UNFAIR LABOR PRACTICE

Lawrence D. Freedman, a 17-year-old student, was employed by Respondent as a part-time salesman in its mens' wear department from August 1980 to February 1981. On April 14, 1981, he filed a charge against Respondent with the National Labor Relations Board, which charge, by its language, claimed that Respondent was interfering with, restraining, and coercing its employees in the exercise of their Section 7 rights by changing the working conditions of and eventually discharging Lawrence D. Freedman. This charge, which had been assigned Case 3-CA-10370, was withdrawn with the consent of the Charging Party on May 18, 1981. On June 13, 1981, Respondent filed a civil lawsuit against both Lawrence D. Freedman and his father, Norman Freedman. The lawsuit was filed in the city court for the City of Ithaca and stated several causes of action, i.e., Lawrence D. Freedman was sued for libel, malicious prosecution, abuse of process, and conspiring with his father, Norman Freedman, to do the aforementioned, while his father, Norman Freedman, was sued for conspiracy and attempted extortion. Lawrence D. Freedman and his father, through counsel, filed an answer to the complaint and filed counterclaims against both the president and one of the owners of Respondent in their individual capacities.

It is contended by the General Counsel that the filing of this lawsuit against Lawrence Freedman and his father because Lawrence Freedman had filed a charge with the

National Labor Relations Board violated Section 8(a)(4) of the Act, which makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." Respondent maintains that it filed its lawsuit against Lawrence D. Freedman and his father in good faith, that the suit had a reasonable basis in fact, and that it committed no unfair labor practice.

I have concluded that in the context of the facts in this case Respondent violated Section 8(a)(1) and (4) of the Act by filing the lawsuit against the Freedmans. I reach this conclusion because I find that Lawrence D. Freedman acted in good faith in filing a charge with the Board in April 1981, and that Respondent filed its lawsuit solely to retaliate against Freedman for filing that charge and the lawsuit lacked a reasonable basis in fact.

The leading cases considered in reaching the conclusion I reached were as follows: *Power Systems*, 239 NLRB 445 (1978), enforcement denied 601 F.2d 936 (7th Cir. 1979); *United Credit Bureau of America*, 242 NLRB 921 (1979), enfd. 643 F.2d 1017 (4th Cir. 1981); *Bill Johnson's Restaurants*, 249 NLRB 155 (1980), enfd. 660 F.2d 1335 (9th Cir. 1981); *George A. Angle*, 242 NLRB 744 (1979).

As noted earlier, Lawrence D. Freedman began his employment with Respondent in August 1980. He was a good salesman but his record at Respondent's store was not without blemish; e.g., he was reprimanded early in his employment for writing inappropriate comments in longhand in Respondent's procedures manual and because he left a note inside a cash register which contained an obscene word. These two incidents had occurred some months prior to an impromptu meeting of Freedman and four or five of his fellow employees at Respondent's store at the end of December 1980. The employees were concerned about a change in the manner in which the pay of sales personnel was going to be calculated; i.e., a change which would deprive the sales personnel, in their opinion, of any benefit from the statutory increase in the minimum wage in New York State. One matter discussed by this group of employees was whether or not they should organize a company union. Freedman volunteered to discuss these matters on behalf of the group with Paul Van Coetsen, Respondent's personnel manager. Shortly thereafter, Freedman approached Van Coetsen, told him of the concerns of the group, and requested that he remain anonymous as the person bringing this matter to the attention of management. Freedman then returned to work.

A short while later Van Coetsen told Freedman, who was scheduled to work for several more hours that evening, that he should go home because it was slow in the store. Van Coetsen told Freedman further that he had passed on to Murray Daitchman, Respondent's president, who ran the store on a day-to-day basis, what Freedman had told him about discontent among the employees and, contrary to Freedman's request that his name not be used, Van Coetsen told Freedman that he told Daitchman that it was Freedman who had brought the matter to his attention. I credit the testimony of Freedman that he believed this was the first time he had been sent home early from work and that he reasonably concluded that he was being disciplined somehow for telling Van Coetsen about the employee discontent. Freedman called Daitchman at home that very night and arranged to meet with him the following morning. During their brief conversation Freedman asked if his job were in jeopardy and was told by Daitchman that this would be discussed in the morning. Freedman was sufficiently concerned that something untoward had happened concerning his job security that he discussed what had happened and its labor law implications with his father.

At the meeting the following morning Freedman was told by Daitchman that his job really had never been in jeopardy. Thereafter, two things occurred which Freedman testified disturbed him. He testified that his hours were reduced and for the first time in his employment history at Respondent's store he was forced to work split shifts.[1]

A few days prior to February 21, 1981, which was Freedman's last day in Respondent's employ, he was involved in an incident with Frank L. Di Pasquale. Di Pasquale at the time was a tailor for Respondent. He subsequently left Respondent's employ and is now a computer engineer. He testified at the hearing that while he was in the tailor's office in the rear of the men's wear department one of the two salesmen on duty in the department, namely, Freedman, activated the intercom and said so that Di Pasquale, but no customers, could hear words to the effect, "Will all Italians, Wops, Guineas, and Dagoes leave the store." Di Pasquale was angry, ran onto the floor, and told Freedman in so many words that he never wanted to hear him say that again. Freedman testified that he said substantially what Di Pasquale said he said except that he did not use the word "guinea." He claimed he did it as a joke and did not think that Di Pasquale would be offended because they were used to kidding around like that. Di Pasquale admitted that he did call Freedman, who is Jewish, a "kike" prior to this and he thought Freedman did not like being called a "kike" and that was why he was particularly offended at Freedman's remarks. Having observed the demeanor of both witnesses I conclude that Freedman was telling the truth as was Di Pasquale. Freedman honestly thought his relationship with Di Pasquale was such that the use of ethnic slurs toward one another was acceptable. He was wrong. Di Pasquale did not like it but he had no excuse for his own prior use of the word "kike" when referring to Freedman. Neither Di Pasquale nor Freedman thought that the "incident" should be reported to management. In fact, management would not even have known anything about it except that the other salesman on duty in the men's department brought it to management's attention. He told management that Di Pasquale was angry and that they might lose their tailor.[2]

[1] Respondent admits that Freedman was put on split shifts but later the policy of working employees on split shifts was stopped. Respondent denies it ever reduced Freedman's hours but I credit the testimony of Freedman that he perceived that his hours were cut and this is corroborated by Respondent's timecards which show reduced hours worked for the weeks ending January 17 and 24.

[2] There is no evidence to suggest that Di Pasquale left Respondent's employ because of this incident.

On Freedman's last day the vice president of the store, who was leaving to go to another position, told Freedman that he (Freedman) was going to be fired on "trumped up" charges of swearing in the presence of a fellow employee and he should resign rather than be fired. I credit Freedman's testimony regarding his conversation with Vice President Robert Greer to include Greer's statement that he had been asked on a number of occasions to "get rid of Freedman." Greer did not testify. Freedman followed the advice of Greer and submitted a hastily written letter of resignation. Later that evening Van Coetsen, the personnel manager, told Freedman that his services were no longer desired by Respondent.

Between February 21, 1981, his last day in Respondent's employ, and April 14, 1981, when he filed a charge with the Board, Freedman spoke with his father, Norman Freedman, with his cousin, Neil Wallace, who is an attorney, and with a representative of the Board regarding the filing of a charge. Lawrence Freedman's father and cousin are both executives for Wallace Steel, a company in the Ithaca area. Norman Freedman, the father of the Charging Party, called Murray Daitchman a week or two before the filing of the April 14, 1981, charge and attempted to negotiate a settlement, prior to the filing of a charge, to avoid the filing of the charge and to protect his son's reputation; namely, that Respondent give a letter of recommendation to Lawrence Freedman and severance pay equivalent to moneys he lost between the time he was forced to resign and/or was discharged and the time he found another part-time job. Daitchman rejected the offer to settle in no uncertain terms.

On April 14, 1981, the charge was filed with the Board. The language of the charge, which is set out in the margin,[3] contains words of art and standard language which were put there by a Board agent following conversations over the phone with Lawrence Freedman. The charge was then mailed to Freedman by the Board. Freedman signed it and returned it to the Board. In light of the above facts I conclude that Lawrence Freedman acted in good faith in filing the charge; i.e., he reasonably believed, based on the timing of events,[4] that he was forced to resign and let go by Respondent because of his involvement with the dissident employees.

On May 18, 1981, the Regional Director for Region 3 withdrew the charge with the consent of the Charging Party. Thereafter, on June 13, 1981, Respondent filed a civil lawsuit against Lawrence Freedman and his father. The lawsuit was filed solely to retaliate against Freedman for filing the original charge in April 1981. The causes of action sounding in abuse of process and malicious prosecution concern themselves strictly with the filing of the charge and no additional action on the part of the Freedmans. The cause of action for libel alleges as libelous the language placed in section 2 of the charge, which language is set out in footnote 3 and which is technical language drafted by a Board agent following a telephone conversation with the Charging Party. The cause of action sounding in extortion relates to Norman Freedman's conversation with Murray Daitchman some 2 weeks prior to the filing of the charge as set forth above. The lawsuit also alleged that the Freedmans conspired with one another to do that which has been previously described as abuse of process, malicious prosecution, and libel. It goes without saying that the filing of such a lawsuit will tend to discourage employees from seeking access to the Board's processes. The amount of $2,000 was sought damages by Respondent. According to Respondent, that figure represents what it cost Respondent during the Board investigation of the April 1981 charge. Respondent did not produce any evidence to show that it was damaged in any way beyond incurring some expenses in connection with the Board investigation, e.g., having its attorney present when store supervisors were interviewed by a Board agent, and the $2,000 in expenses was an approximation only. Accordingly, it can only be concluded that this lawsuit was filed to retaliate against the Charging Party and his father for filing the charge and that the lawsuit has no basis in fact.

Neil Wallace, Lawrence Freedman's cousin, represented both Freedmans in the lawsuit against them. Respondent was represented by the same counsel who represents it in the instant case. The Freedmans filed an answer in the civil lawsuit in which they denied all legal liability and counterclaimed against Murray Daitchman, Respondent's president, and Robert Congel, one of the owners of Respondent. Damages in the amount of $225,000 were sought. The answer and counterclaims are dated August 12, 1981. A second charge, which is the subject matter of this proceeding, was filed with the Board on July 13, 1981.

On September 4, 1981, shortly after the complaint in this matter issued, the attorney for Respondent and the attorney for the Freedmans entered into a "Stipulation Discontinuing Action" which had the effect of dismissing the lawsuit against the Freedmans and the counterclaims against Daitchman and Congel.

III. THE REMEDY

Since I find the filing of the lawsuit by Respondent against Lawrence D. Freedman and his father violated Section 8(a)(1) and (4) of the Act, I will order Respondent to cease and desist from this or similar misconduct. If

[3] The charge read:

> Since on or about January 1, 1981, [Respondent], by its officers, agents and representatives, has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees of J. W. Rhodes, in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, to refrain from any or all such activities, which rights are guaranteed in Section 7 of the said Act, by changing the working conditions and terminating the employment of Lawrence D. Freedman, salesman, and at all times since such date does now refuse to rescind the discrimination against the above named employee.

[4] After he spoke to Van Coetsen he was told to go home early. In a telephone conversation that night with Daitchman, Freedman said his job appeared in jeopardy. Subsequently, his hours were reduced, he was put on split shifts, and he was told by Greer that he was going to be fired on "trumped up" charges.

the lawsuit were still pending, part of the remedy would be to order that the lawsuit be withdrawn. Lastly, Respondent should reimburse Lawrence D. Freedman and his father for all legal expenses they incurred in the defense of the lawsuit instituted against them in the city court for the City of Ithaca.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By filing a civil lawsuit against Lawrence D. Freedman and Norman Freedman because Lawrence D. Freedman filed a charge with the National Labor Relations Board, Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and (4) and Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby recommend the issuance of the following:

ORDER[5]

The Respondent, J. W. Rhodes Department Stores, Ithaca, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Filing civil lawsuits against employees and/or their relatives because the employee has filed a charge against Respondent with the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Reimburse Lawrence D. Freedman and Norman Freedman for all legal expenses they have incurred in the defense of the lawsuit filed against them in the city court for the City of Ithaca.

(b) Post at its Ithaca, New York, facility copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT file civil lawsuits against employees and/or their relatives because the employee has filed a charge against us with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in the National Labor Relations Act.

WE WILL reimburse Lawrence D. Freedman and Norman Freedman for all legal expenses incurred by them in defending the lawsuit we filed against them in the city court for the City of Ithaca.

J. W. RHODES DEPARTMENT STORES